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MARINE RISK AND WAR RISK. — The exigencies of submarine warfare have made it difficult, in many cases, to decide whether the loss of a vessel should be borne by the marine or by the war insurer. War risks are themselves but a subdivision of the more general class of marine risks,[1] but it early became customary for the marine underwriter specifically to except from his policy any liability for war losses, by a warranty — "warranted free of capture and seizure and all consequences of hostilities and warlike operations" — generally known as the f. c. s. clause.[2] The next step was for the shipowner to insure

[1] The earliest English policies of marine insurance enumerate many perils of war among those the insurers undertake to bear. Magens gives a policy dated in London in 1744: "Touching the Adventures and Perils which we the Assurers are contented to bear, and take upon us in this Voyage, they are, of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettizons, Letters of Mart and Countermart, Surprizals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People of what Nation, Condition or Quality soever, Barretry of the Master and Mariners and of all other Perils, Losses or Misfortunes that have come or shall come to the Hurt, Detriment or Damage of the said ship . . ." 1 MAGENS ON INSURANCE (London, 1755), 552. This form of policy has remained the standard to the present day. See 1 ARNOULD, MARINE INSURANCE, 9 ed., § 10. The British Marine Insurance Act, 1906 (6 EDW. VII, c. 41), specifically includes war perils in the definition of maritime perils. "'Maritime perils' means the perils consequent on, or incidental to, the navigation of the sea, that is to say perils of the seas, fire, war perils . . ." 6 EDW. VII, c. 41, § 3 (2) (c). A policy against the "risks contained in all regular policies of insurance" covers loss by capture. Levy *v.* Merrill, 4 Me. 180 (1826). A general policy without warranty covers war risks. Barnewall *v.* Church, 1 Caines (N. Y.), 217 (1803); Hodgson *v.* Marine Ins. Co., 5 Cranch (U. S.) 100 (1809).

[2] See 2 ARNOULD, MARINE INS., 9 ed., § 903.

himself by a separate policy against these losses. This being the case, in an action on either a war policy or a marine policy the problem is to discover whether the loss, being a marine loss, is not also a "consequence of hostilities." If it is, it is excluded from the marine policy and falls within the war policy.[3]

The fact that war risks form an excepted subdivision in the category of marine risks has the further effect, once the shipowner has shown a *prima facie* marine loss, of putting the burden of proof on the marine insurer to show that the loss was caused by an excepted peril.[4] For example, when a ship puts to sea and is never heard from again, the loss is *prima facie* ascribable to a marine peril, and if the marine insurer would escape liability on the ground that the loss was caused by war, the *onus* of proving it is on him.[5] On the other hand, in an action against the underwriter of war risks, the owner must show that his loss was proximately caused by the peril insured against.[6]

The problem may arise where a vessel is successively the victim of an enemy attack and of the fury of the seas, and the result is total destruction. If it is shown that the hostile act so weakened the vessel that she was unable to withstand the subsequent storm, or if in any other way it can be proved that the hostile act proximately caused the loss, the war risk insurer alone is liable.[7] But the problem presents a

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[3] But in an action for salvage, if the claim is for saving the vessel from both a war risk and a non-war marine risk, the claim may be apportioned. Pyman Steamship Co. *v.* Lord Commissioners of the Admiralty, [1919] 1 K. B. 49.

[4] Green *v.* Brown, 2 Strange, 1199 (1744); Munro Brice & Co. *v.* War Risks Association, [1918] 2 K. B. 78. The rule is the same in the case of other excepted liabilities. Ajum Goolam Hossen *v.* Union Marine Ins. Co., [1901] A. C. 362.

[5] The amount of evidence necessary to prove that the loss was caused by a war risk may not be great in time of war. A bottle containing a paper with the message, "Oriole torpedoed, sinking," washed ashore two months after the Oriole left London for Havre, in conjunction with the known operation of submarines in the Channel, was sufficient evidence to prove that the Oriole's loss was due to war. General Steam Navigation Co. *v.* Commercial Union Assurance Co., 31 T. L. R. 630 (1915). The length of the voyage, absence of any storm, seaworthiness of the ship, and the competency of the master, are evidence to determine whether the loss was from a war or sea peril. Macbeth *v.* The King, 115 L. T. 221 (1916); Euterpe Steamship Co. *v.* North of England Protective and Indemnity Association, 33 T. L. R. 540 (1917); British & Burmese Steam Navig. Co. *v.* Liverpool & London War Risk Ins. Co., 34 T. L. R. 140 (1917); Compania Maritima *v.* Wishart, 34 T. L. R. 251 (1918).

[6] An underwriter is not liable for a loss not proximately caused by a peril insured against. De Vaux *v.* Salvador, 4 A. & E. 420 (1836); Pink *v.* Fleming, 25 Q. B. D. 396 (1890); Bird *v.* St. Paul Fire & Marine Ins. Co., 224 N. Y. 47, 120 N. E. 86 (1918). See 2 ARNOULD, MARINE INS., 9 ed., § 783. The rules as to proximate causation apply equally in determining whether a loss falls within an excepted peril. Ionides *v.* Universal Marine Ins. Co., 14 C. B. (N. S.) 259 (1863); William France, Fenwick & Co. *v.* North of England Protecting & Indemnity Association, [1917] 2 K. B. 522. But if the policy excepts liability for "direct or indirect" results of war the maxim *proxima causa* does not apply. Letts *v.* Excess Ins. Co., 32 T. L. R. 361 (1916).

[7] Leyland Shipping Co. *v.* Norwich Union Fire Ins. Society, [1918] A. C. 350; Lobitos Oil Fields *v.* Admiralty Commissioners, 34 T. L. R. 466 (1918). A similar question is raised where a vessel is captured by the enemy and subsequently destroyed by fire or storm. Dole *v.* New England Mutual Ins. Co., 2 Cliff. 394, Fed. Cas. No. 3,966 (1864); Andersen *v.* Marten, [1908] A. C. 334. *Cf.* Roura and Fourgas *v.* Townend, [1919] 1 K. B. 189. Where the vessel was first stranded and then captured the following cases held the capture the proximate cause of the loss. Green *v.* Elmslie, 1 Peake N. P. 278 (1792); Livie *v.* Janson, 12 East, 648 (1810); Ionides *v.* Universal

much more difficult aspect when there are not two separate attacking forces but a single cause of the catastrophe and it is necessary to decide whether or not that is a risk of war. Such is the case where a vessel in convoy, sailing a zigzag course ordered by a naval officer, runs upon a reef, or where ships collide while navigating the war zone without lights. Stranding and collision are but the commonest of the perils of the sea; yet in these cases the accident would not have happened but for the extra-hazardous methods of navigation necessitated by the war. In *British Steam Navigation Co.* v. *Green* [8] the Court of Appeal held that stranding under the circumstances above mentioned was not a consequence of hostilities or warlike operations. On the collision question the British courts have decided that where one of the colliding ships is a war vessel on active duty the collision is a consequence of a warlike operation.[9] But in *Britain Steamship Co.* v. *The King*,[10] although it was admitted that the proximate cause of the loss was the absence of lights on the vessels, it was held that the loss was not a consequence of hostilities or warlike operations. Bailhache, J., in the Divisional Court said,[11] "In my judgment the Admiralty regulations that vessels should navigate at night without lights greatly increased the risk of collision but left it a marine risk." [12] If the Admiralty can thus increase the marine risk for the purpose of decreasing the war risk, it would seem that the whole question of proximate causation is beside the point and that the war insurer indemnified against captures, torpedoings, and collisions with warships and the marine insurer against stranding and foundering and ordinary collisions regardless of whether or not they were proximately caused by the war.[13] But that this is not the view really taken by the English courts appears in *Henry & MacGregor* v. *Marten*,[14] where the captain of a vessel rammed a floating

Marine Ins. Co., 14 C. B. (N. S.) 259 (1863); Patrick *v.* Commercial Ins. Co., 11 Johns. (N. Y.) 9 (1814). In the following cases the stranding alone was the proximate cause of loss. Hahn *v.* Corbett, 2 Bing. 205 (1824); Patrick *v.* Commercial Ins. Co., 11 Johns. (N. Y.) 14 (1814). *Cf.* British India Steam Navig. Co. *v.* Green, [1919] 2 K. B. 670.

[8] [1919] 2 K. B. 670. See RECENT CASES, *infra*, p. 732. *Cf.* Muller *v.* Globe & Rutgers Fire Ins. Co., 246 Fed. 759 (1917). See note 12, *infra*.

[9] British and Foreign Steamship Co. *v.* The King, [1919] 2 K. B. 773; Ard Coasters *v.* The King, 35 T. L. R. 604 (1919).

[10] [1919] 2 K. B. 670. See RECENT CASES, *infra*, p. 732. Owners of Steamship Larchgrove *v.* The King, 36 T. L. R. 108 (1919), *Accord*.

[11] [1919] 1 K. B. 575, 582.

[12] *Cf.* Ionides *v.* Universal Marine Ins. Co., 14 C. B. (N. S.) 259 (1863). In Le Quellec et Fils *v.* Thompson, 115 L. T. R. 224 (1916), a war policy was specifically made to cover losses from "extinction of lights." The ship went ashore on a cape, where the light had been extinguished, but the court found that this was not the proximate cause of the stranding. In Muller *v.* Globe & Rutgers Fire Ins. Co., 246 Fed. 759 (1917), the vessel was stopped by a destroyer and ordered to follow a course close to a shore on which all aids to navigation had been extinguished for war reasons, and in obeying this order ran ashore. It was held that this loss was a consequence of hostilities.

[13] It has been argued that marine insurers do not undertake to make good all losses from certain causes, but that they contract to indemnify against certain classes of losses, however caused. See Abbot, "Perils of the Sea," 7 HARV. L. REV. 221.

[14] 34 T. L. R. 504 (1918). Generally a loss incurred in attempting to avoid a peril insured against is recoverable as being proximately caused by the peril. Covington *v.* Roberts, 2 B. & P. N. R. 378 (1806); Butler *v.* Wildman, 3 B. & Ald. 398 (1820); Ins. Co. *v.* Boon, 95 U. S. 117 (1877); Marcy *v.* Merchants Mutual Ins. Co., 19 La.

object believing it to be a submarine and sank his own vessel. The court held that whether or not the object was a submarine the loss was the consequence of warlike operations.

The question of war risk or marine risk will always be chiefly a question of fact and of the interpretation of the particular policy, but as yet no sufficient reason has been suggested why a loss from a collision between two merchant vessels bound on peaceful missions, if caused by war, should not be reckoned the result of a war risk.

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THE EFFECT OF BANKRUPTCY ON A RIGHT OF ENTRY FOR CONDITION BROKEN. — In *Matter of Elk Brook Coal Co.*,[1] the District Court for the Middle District of Pennsylvania decided that a landlord who, prior to the bankruptcy of his tenant, had become entitled to terminate the lease for a default in the payment of rent and royalties, might do so subsequently against the latter's trustee in bankruptcy.[2] The case, however, contains *dicta* that if the landlord could have been assured complete financial reparation the trustee would have been permitted to retain the leasehold despite the provision for re-entry contained in the lease. The soundness of the decision itself seems unquestionable; [3] that of the qualifying *dicta* perhaps somewhat less patent.

Bankruptcy courts evince at times a rather high-handed tendency to extend the effect of bankruptcy in defeating existing rights beyond that called for or authorized by the Bankruptcy Act. The jurisdiction which they assert to sell, free and clear of encumbrances, property of the bankrupt's already subject to valid liens, and to remit the lienholders to a claim upon the proceeds, is an example of this tendency.[4] So too was the unsuccessful attempt to establish by judicial legislation that an insolvent tenant, whose trustee in bankruptcy refused to assume the lease, was *ipso facto* relieved by bankruptcy from further obligations under it.[5]

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Ann. 388 (1867); Singleton *v.* Phenix Ins. Co., 132 N. Y. 298, 30 N. E. 839 (1892). *Cf.* Société Nouvelle D'Armement *v.* Spillers, [1917] 1 K. B. 865. But the loss incurred in abandoning the voyage because of fear of capture cannot be recovered on a war policy as a consequence of hostilities. Hadkinson *v.* Robinson, 3 B. & P. N. R. 388 (1803); Lubbock *v.* Rowcroft, 5 Esp. 50 (1803); Nickels & Co. *v.* London & Provincial Marine Ins. Co., 70 L. J. Q. B. N. S. 29 (1900); Kacianoff *v.* China Traders Ins. Co., [1914] 3 K. B. 1121; Becker Gray & Co. *v.* London Assurance Corp., [1918] A. C. 101. *Cf.* The Knight of St. Michael, [1898] P. 30. But if the voyage is abandoned because its further prosecution would be illegal as trading with the enemy, the insured can recover for a "restraint of princes." British & Foreign Marine Ins. Co. *v.* Sanday, [1916] 1 A. C. 650; Associated Oil Carriers *v.* Union Ins. Society, [1917] 2 K. B. 184.

[1] 44 Am. B. R. 283 (D. C. Pa., 1919).

[2] For a more complete statement of the facts of this case, see RECENT CASES, p. 725.

[3] Lindeke *v.* Associates Realty Co., 17 Am. B. R. 215; 146 Fed. 630 (C. C. A., 8th Circ., 1906). See 1 REMINGTON, BANKRUPTCY, § 983; 1 LOVELAND, BANKRUPTCY, § 387.

[4] *In re* Pittelkow, 92 Fed. 901 (D. C. E. D. Wis., 1899).

[5] *In re* Jefferson, 2 Am. B. R. 206, 93 Fed. 948 (D. C. Ky., 1899); Bray *v.* Cobb, 3 Am. B. R. 788, 100 Fed. 270 (D. C. N. C., 1900). See 1 REMINGTON, BANKRUPTCY, § 653, and see an article in 39 AM. L. REG. (N. S.) 656 on this subject.